United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1097

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

UNITED STATES OF AMERICA

Appellee

-v-

ROBERT DiGIOVANNI

Appellant

----------X

BRIEF FOR APPELLANT ROBERT DiGIOVANNI

Appeal from A Judgment of
Conviction in the United States
District Court for the Eastern
District of New York

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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA

Appellee

Docket No. 76-1097

-against-

ROBERT DiGIOVANNI

Appellant

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BRIEF FOR APPELLANT ROBERT DiGIOVANNI

Robert DiGiovanni appeals from his conviction of May 21, 1976 in the United States District Court for the Eastern District of New York (Costantino, J) upon two jury verdicts: one for robbing the Atlas Federal Savings & Loan Association on July 18, 1975 and the Chase Manhattan Bank on July 24, 1975, and a second for an armed robbery of the National Bank of North America on July 2, 1975. His sentence was fifteen years.

ISSUES PRESENTED FOR REVIEW

With respect to the first trial

1. Whether the Government withheld evidence favorable to defendant with respect to the voluntariness of the alleged consent of DiGiovanni's seventeen year old girlfriend to a warrantless search of their apartment.

2. Whether the district court erred in permitting the Government to try the July 18 robbery together with that on July 24.

With respect to the second trial

3. Whether the district court erred in refusing to sever DiGiovanni's case from that of his co-defendant Sadowski, when one part of Sadowski's defense was to demonstrate that DiGiovanni had committed a series of robberies.

With respect to both trials

4. Whether the district court erred in permitting a West Street cellmate of DiGiovanni and his accomplice Grafman to testify to post-conspiracy statements of Grafman implicating DiGiovanni.

STATEMENT OF THE CASE

On August 4, 1975 the Government filed Indictment 75 CR 608 against DiGiovanni, Michael Grafman, Michael Sadowski and Stanley Loskocinski. The indictment covered four bank robberies in eight counts.

Counts 1 and 2 charged Grafman, Sadowski and DiGiovanni with robbing the National Bank of North America on July 2, 1975; counts 3 and 4, Grafman and DiGiovanni the Chase Manhattan Bank on July 17; counts 5 and 6 Grafman, DiGiovanni and Loskocinski the Atlas Federal Savings & Loan Association on July 18; and counts 7 and 8 Grafman, DiGiovanni and Loskocinski another Chase Manhattan branch on July 24.*

The Government tried DiGiovanni first on the two robberies committed with Grafman and Loskocinski. Both pleaded guilty and were the principal witnesses against him. DiGiovanni's objection to joinder of the two robberies in a single trial was unavailing. (D26-28, JA 68-70).** The jury convicted him of both crimes.

In the second trial, DiGiovanni was joined with Sadowski and Patrick Doughtery, his alleged accomplices along with Grafman, in the July 2 robbery with loaded weapons.*** Grafman again testified for the Government. The jury

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*There were two counts on each robbery since the first charged the robbery itself, 18 U.S.C. 2113 (a), and the second the robbery aggravated by assault and placing lives in jeopardy by use of a dangerous weapon. 18 U.S.C. 2113 (d). The Government dropped the aggravated counts on the robberies in the first trial since the guns used in those robberies were not loaded.

**We shall use D in advance of a number to refer to the transcript of the first trial. Numbered references without designation are to the transcript of the second trial. Parallel JA references are to the Joint Appendix.

***Doughtery was indicted separately but joined for trial.

convicted him and Sadowski on the aggravated count (the district court charged that if the jury found defendants guilty on the aggravated cout, it need not consider the simple count), but acquitted Doughtery.

DiGiovanni repeatedly objected to his inclusion in a joint trial with Sadowski since Sadowski's defense was that DiGiovanni and Grafman had committed the series of July robberies and Grafman had picked and chosen the people he would implicate in each (62, JA 38). The district court, however, refused to grant a severance.

The July 18 Robbery

Preliminary witnesses told how two masked individuals entered the Atlas Bank, vaulted the teller cage, and started taking money out of the drawers (D41-43). One was carrying a western style six shooter and had aimed the gun at, but not shot, the assistant treasurer (D42). They escaped in a white Oldsmobile, with Connecticut license plates (D46).

Grafman and Loskocinski then testified that they had robbed the Atlas bank with DiGiovanni. Grafman (holding the gun) and DiGiovanni went into the bank and Loskocinski drove the car. Afterward they went to DiGiovanni's apartment and split the money three ways. See. D92-103, 148-53. They obtained $5,692.

The July 24 Robbery

The preliminary witnesses here worked at the 9318 Third Avenue, Brooklyn branch of Chase Manhattan. Two robbers obtained approximately $5,000. which included bait money with recorded serial numbers. (D65-71). An employee had activated the surveillance cameras and their clicking could be heard. One of the

robbers yelled "Come on, Joey. Let's go", and the other one, behind the counter, jumped over it and they both left (D61).

The events leading up to this robbery were quite different from the other. Loskocinski didn't want to use his own car. He stole a car from a construction site where he formerly worked, but that car went dead and they had to revert to his. (D104-06; 153-60). When they entered the bank, Grafman forced the guard to lay on the floor (D108). Grafman was the one who had called DiGiovanni while the cameras were clicking but he had used the name "Joey" (111). The split this time was not equal, Grafman and DiGiovanni ripping part off the top for themselves without giving Loskocinski a share (D110).

The July 2 Robbery

This robbery was committed by three men, with the getaway car driven by a fourth. The Government's proof was that DiGiovanni, Grafman and Sadowski were the three individuals who entered the bank with loaded guns, and obtained $15,549.89, while Doughtery was the driver. Grafman was the Government's principal witness. In addition to stating that DiGiovanni had been with him on the robbery, he was permitted to testify about discussions with Sadowski about committing other robberies with DiGiovanni. Sonia Karakitis, with whom DiGiovanni was living, was also permitted to testify about a telephone call from DiGiovanni to Sadowski seeking to elicit Sadowski's participation in another robbery which was to occur that weekend.

The Search of the Karakitis Apartment

DiGiovanni was arrested on July 25, 1975 outside the Karakitis apartment. (D292). He kept his belongings there. (D295). He had also spent $6,000. to

furnish that apartment, and a new one he was taking with her.

After arresting DiGiovanni the agents searched the Karakitis apartment. They had no search warrant although they had ample time and opportunity to obtain one. The Government claimed that Sonia Karakitis had given her consent. The agent gave testimony about consent easily asked and freely given, stating simply (D273):

> "I explained to her what we were doing there and who we were and asked her for permission to search the apartment..... She said there was no problem; that she would freely give her permission to search."

Karakitis signed a writing with her consent.

Based on the agent's testimony, the court found that voluntary consent had been given and that the search was valid (D275-76, JA 71-72).

Sonia Karakitis was then cooperating with the Government. Indeed she was an important Government witness a few days later at the second trial. The Government, however, did not call her to testify about the alleged consent. What emerged at the second trial made it quite apparent why. It turned out:

(a) That Sonia was only sixteen or seventeen (807) and had only child-like comprehension of what was taking place.

(b) That the agents came to the apartment at about 8:30 in the evening while Sonia had just come out of the shower and was dressed only in a towel (881).

(c) That the agents, after knocking on the door and seeing Sonia peek out, "pushed it in on" her (881).

(d) That Sonia then went in back of the door and "screamed and said don't come in" (881), but there then entered quite a few agents and a

New York City policeman.

(e) That the agents entered with DiGiovanni, in handcuffs, had Sonia identify him, and then took him out (883).

(f) That Sonia was "nervous" (882), and "afraid" (887).

(g) That as best she can remember, the agents told her she could be in difficulty (889) and questioned her from 8:30 p.m. to 1:00 a.m.

The search turned up sneakers with bottoms which matched sneaker prints left at the Atlas bank by one of the robbers (D259, 279-80), a stocking mask which matched the descriptions given by the witnesses to the robberies, a pair of brown work gloves matching those used by one of the robbers, a sweatshirt identical to that seen one one of the robbers in the surveillance photographs (D259-60), and recipts to DiGiovanni for clothing and furniture expenditures. (D313, 315).

The Markson Testimony

Irving David Markson testified for the Government at both trials. After a long criminal history both here and in his native England, he had been at West Street in July, 1975 with Grafman and DiGiovanni (D193-94), and had engaged them in conversation. Both had said they robbed banks because the money was good, and DiGiovanni had talked about jumping onto a counter and about a car and a getaway driver (D196). DiGiovanni had also said that he had spent the money on shirts and clothes and six thousand dollars to furnish an apartment to impress a girl friend (D197-98).

Marskon gave the same testimony at the second trial.

ARGUMENT

(Points I and II apply to the first trial. Point III applies to the second. Point IV applies to both).

POINT I

THE GOVERNMENT DELIBERATELY WITHHELD EVIDENCE FAVORABLE TO DIGIOVANNI ON THE VOLUNTARINESS OF THE CONSENT TO THE SEARCH OF THE KARAKITIS APARTMENT

The Government, we submit, deliberately withheld Sonia Karakitis from the court because it knew she presented serious problems in validating the warrantless search. Nor did the Assistant inform DiGiovanni of the nature of the evidence she might offer as he was required to do. The Government therefore violated DiGiovanni's rights under Brady v. Maryland 373 U.S. 83 (1960), even though it offered to make Karakitis available if the defense wanted to call her (D276).

One point stands out on this issue stemming from the substantive proof in the Government's case involving her. Grafman and Loskocinski both testified that before the second robbery they and DiGiovanni drove Sonia and her girlfriend Joanne Pellegrino to the subway in two cars--the stolen one and that of Loskocinski (D105-06, 157-60, 240). DiGiovanni, moreover, was in the apartment after the robbery counting the money with Sonia (D242-43).

Sonia was available, was cooperating with the Government, and could have testified directly and in detail to her activities with DiGiovanni. The Government did not call her. Instead, it corroborated Grafman and Loskocinski through Joanne Pellegrino--the other seventeen year old also living then with Sonia, who had been driven with her to the subway, and who had seen her and DiGiovanni

counting the money on the bed (D236-43). Only in the second trial, with the search issue safely behind it, did the Government call Sonia as a witness against DiGiovanni.

DiGiovanni, of course, had standing to object to the search since it was aimed at him, he was living in the apartment, and he had helped pay for the furniture. Jones v. United States, 362 U.S. 257 (1960); United States v. Mapp, 476 F.2d 67, 71-72 (2d Cir. 1973). Although Sonia's consent could excuse the absence of a warrant, United States v. Matlock, 415 U.S. 164 (1974), that consent had to be voluntary and without coercion, explicit or implicit. Schneckloth v. Bustamonte, 412 U.S. 218 (1973); United States v. Mapp, 476 F.2d at 77 (invalidate search of woman's apartment to find heroin belonging to male defendant; "this case presents an instance of submission to official authority under circumstances pregnant with coercion"). The search turned up devastating physical evidence (sneakers, mask, gloves and receipts for clothing and furniture), so that the harmless error rule could not save the conviction.

Reversal and the grant of a new trial is appropriate at which the district court may properly rule on Karakitis' alleged consent with the evidence deliberately withheld by the Government.

POINT II

THE DISTRICT COURT ERRED IN PERMITTING A JOINT TRIAL OF TWO DIFFERENT ROBBERIES

Although joinder for trial of the July 18 and July 24 robberies at first seems to satisfy the requirements of F.R. Crim. P. 8(a), deeper analysis demonstrates that the two robberies should not have been tried together.

In the first place, we do not believe that at a trial of the first robbery, the Government would have been able to introduce evidence of the second. The prejudicial impact would have so far outweighed the probative value that such evidence would have had to be excluded. United States v. Papadakis, 510 F.2d 287 (2d Cir. 1975); United States v. Torres, 519 F.2d 723 (2d Cir. 1975).

It is well established that the requisite prejudice to prevent a Rule 8 (a) joinder exists if evidence of one of the crimes joined could not come in on a separate trial of the other. United States v. Begun, 446 F.2d 32 (9th Cir. 1971); Bayless v. United States, 381 F.2d 67 (9th Cir. 1967).

Second, joinder of several crimes will not be allowed where the witnesses can confuse the different episodes. United States v. Adams, 434 F.2d 756, 758-59 (2d Cir. 1970) (citing United States v. Lotsch, 102 F.2d 35 (2d Cir. 1939)). That happened here. Grafman, for example, first said that the July 18 robbery was Chase Manhattan, then changed it to Chemical, then finally said Atlas (D88). He testified that on the Chase robbery they had picked Sonia up at a laundromat, then changed it to dropping her off at a train station, then finally said (D110):

> "No. I got it mixed up.
> "The first one at the Atlas, we dropped her at the laundromat and the second one we took them to the 18th Ave. station."

Loskocinski was confused as well. At his guilty plea he told the court he received $500 from the Chase robbery. At trial he changed it to $300 (D162). His mistake, he said, was "Because I had gotten it mixed up with the Atlas Savings Bank" (D163).

Finally, we note other differences between the crimes which should have kept them separate. In the second, the man behind the counter had been called "Joey". This raised a different identification issue. The facts were further changed by Loskocinski's stealing a car for the job. Since a separate trial on the Chase robbery could not have lasted more than a day and a half, or two at the most, and since the joinder clearly prejudiced DiGiovanni, separate trials of the two crimes should have been ordered. United States v. Carter, 475 F.2d 349 (D.C. Cir. 1973) (error to join together defendant's armed robbery of a service station, with defendant's armed robbery of a restaurant parking lot, all within a few days of each other); Drew v. United States, 331 F.2d 85 (D.C. Cir. 1964) (error to join together defendant's armed robbery of a High's neighborhood store with defendant's attempted armed robbery of different High's store two weeks later).

POINT III

IN THE SECOND TRIAL THE CROSS EXAMINATION OF THE PRINCIPAL GOVERNMENT WITNESS BY COUNSEL FOR SADOWSKI WAS SO PREJUDICIAL TO APPELLANT DIGIOVANNI THAT EITHER A SEVERANCE OR A MISTRIAL SHOULD HAVE BEEN GRANTED BY THE TRIAL COURT

In the second case a conflict developed when counsel for appellant Sadowski insisted on his right to cross-examine the Government witness Michael Grafman as to the other bank robberies Grafman had allegedly committed with

appellant DiGiovanni (59-77). Counsel for DiGiovanni objected in this conference, and later entered a continuing objection to the examination of Grafman as proposed by counsel for Sadowski.

However, counsel for Sadowski proceeded to cross-examine Grafman as to the bank robberies set forth in counts 3, 4, 5, 6, 7, and 8 in none of which counts was Sadowski named as a defendant. The cross-examination was particularly searching and ran from page 362 to page 539 of the Trial Transcript. The cross-examination stressed the parts those charged played in the robberies in which the defendant Sadowski did not participate. In effect, counsel for Sadowski, was departing from his role of defending his client and had embarked on the role of prosecutor as to those counts of the indictment in which his client had not been named.

The result was to irreparably prejudice the appellant DiGiovanni who was constantly named throughout. This was not a case of a prosecutor pursuing his legitimate function of proving various counts of the indictment, but the counsel for a co-defendant departing from his function.

Using 3500 material relative to the robbery charged in counts 3 and 4, counsel for Sadowski cross-examined as to statements made by Grafman relative to that robbery in which Sadowski was not named as a participant (526-35). Such conduct on the part of counsel for a co-defendant operated to deprive appellant DiGiovanni of his right to a fair trial. In United States v. DeLuna, 308 F.2d 140 (5th Cir. 1962) a similar situation had arisen. In that case a similar situation had developed when counsel for one defendant attacked a co-defendant and stressed the fact to the jury that the co-defendant hadn't taken the stand in his own defense. There the court reversed as to the co-defendant,

DeLuna. However, the concurring opinion by Circuit Judge Bell has a comment especially applicable to this case:

> "With deference to the majority I think this matter is controlled over-all by the right to a fair trial under the Sixth Amendment to the Constitution. The right of DeLuna under the Fifth Amendment, and Title 18 U.S.C.A. Section 3481 not to have the fact that he failed to testify commented on is involved primarily. But the right of Gomez to take the stand under Section 3481 and to a full and fair defense, and the right of the public to the enforcement of the criminal statutes are also involved. These rights must be balanced by the court whose duty it is to see that a fair trial is afforded while at the same time protecting all rights."

The only way this could have been achieved in this case was to have granted counsel's motion for a severance at the beginning of trial.

In United States v. Johnson, 478 F.2d 1129 (5th Cir. 1973) a situation had arisen where one defendant made a motion for a severance on the ground that the defense theory of one defendant was completely antagonistic to that of his co-defendant. There the court held that a severance should have been granted at the outset and that the refusal to grant the same was an abuse of the trial court's discretion.

In United States v. Barerra, 486 F.2d 333 (2d Cir. 1973) this court upheld the trial court in refusing to grant a severance when one defendant offered an insanity defense which assumed that the charges made by the Government were true. However, this was not a case where the trial took place in a serious atmosphere of conflict as in this trial. Counsel for DiGiovanni stated on page 411 of the Trial Transcript that his client could not get a fair trial under the circumstances of this case. With such a serious conflict the

trial court should have either granted the severance at the outset, or declared a mistrial as to appellant DiGiovanni.

POINT IV

THE DISTRICT COURT ERRED IN PERMITTING MARKSON TO TESTIFY TO POST ARREST STATEMENTS OF GRAFMAN

Over DiGiovanni's objection (D197) the Government was permitted to place before the jury a host of incriminating statements by Grafman and DiGiovanni to their West Street cellmate Markson. DiGiovanni's statements were admissions but the Government had no right to introduce those of Grafman implicating DiGiovanni, whether in the presence of DiGiovanni or not. The crimes were long since over, the defendants were arrested and in jail, and there was no continuing conspiracy following their arrest pursuant to which the statements were made.

The testimony was inflammatory and prejudicial and its admission not harmless error.

CONCLUSION

In addition to the foregoing reasons, DiGiovanni relies also on all other points raised by co-appellant Sadowski to the extent applicable.. This encompasses particularly the district court's error in admitting testimony concerning DiGiovanni's discussions with Sadowski about other robberies (p. 5 supra, Point II of the Sadowski Brief) and the improper summation of the Government as well as restrictions on cross-examination of Sonia Karakitis (Points III and IV).

This Court should reverse the conviction on the counts on the first

trial with directions that the July 18 and July 24 robberies be separately tried. The conviction on the counts on the second should also be reversed with directions that DiGiovanni and Sadowski be separately tried.

Respectfully Submitted,

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